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CHARLES ELMORE CROPLEY

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1927.

No. ~~852~~ 96

The State Highway Commission of Wyoming, consisting of Hyram Lingle, T. D. O'Neil, S. W. Conwell, J. M. Snyder and Roy Seney,
Petitioner,

vs.

Utah Construction Company, a corporation,
Respondent.

Respondent's Brief in Resistance to Application for Writ of Certiorari.

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IN THE

SUPREME COURT

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OCTOBER TERM, 1927.

No. 852.

The State Highway Commission of Wyoming, consisting of Hyram Lingle, T. D. O'Neil, S. W. Conwell, J. M. Snyder and Roy Seney,
Petitioner,

vs.

Utah Construction Company, a corporation,
Respondent.

Respondent's Brief in Resistance to Application for Writ of Certiorari.

STATEMENT.

Utah Construction Company brought this action in the United States District Court for the District of Wyoming to recover damages against The State Highway Commission of Wyoming for breach of contract, alleging that the Commission had entered into a contract with the Construction Company by which the Construction Company

was to construct a certain highway at a fixed rate per yard, according to a certain surveyed line or course along Wind River Canyon in Wyoming. Under this construction contract the stakes fixing the grade and alignment, as surveyed, were to be fixed by the Commission, and these contractor was to follow. After the making of the contract, and in violation of the obligation imposed thereby to stake out the line in accordance with the survey, the Commission, without notifying the plaintiff, and without its knowledge, made a new survey and restaked the line of the highway so that the construction thereof became much more difficult and expensive.

Jurisdiction of the United States District Court was invoked under *section 24 of the Judicial Code* (U. S. Code, section 41, subdivision 1) confe ring original jurisdiction where the matter in controversy is between citizens of different states, it being alleged in the complaint, or petition, that the plaintiff, Utah Construction Company, was a corporation and resident of the state of Utah, and that The State Highway Commission of Wyoming, and its individual members, were citizens and residents of the state of Wyoming.

A demurrer on the ground that the United States District Court was without jurisdiction was sustained, resulting in the appeal to the United States Circuit Court of Appeals for the Eighth Circuit, which in the present proceeding is sought to be reviewed.

That the District Court had no jurisdiction over the subject matter was based upon the claim that the real defendant in the action was not The State Highway Commission of Wyoming, but the state of Wyoming itself, and, since a state is not endowed with citizenship, that there

was not the requisite diversity of citizenship appearing in the record to confer jurisdiction.

On the other hand, the Utah Construction Company contended, and here submits, that The State Highway Commission of Wyoming, as constituted by the Legislature of Wyoming, is a juristic body with certain individual attributes and functions, and especially endowed with the right to execute contracts in its own name and over its own seal, and to sue and be sued in its own name. Such juristic body, for the purpose of conferring jurisdiction upon the court, must be held to be a citizen of Wyoming under the purview of *section 24 of the Judicial Code*, either by virtue of the fact that the Commission is a *quasi* corporation, or if not a *quasi* corporate body, then by virtue of the fact that it is a collective body of individuals each of whom is a citizen of Wyoming.

The statute of Wyoming creating The State Highway Commission is quoted in the opinion of the Circuit Court of Appeals at pages 122-125 of the transcript of record. An analysis of this act of the Legislature of Wyoming shows that the body thus created is not the state itself, but a separate, individual and distinct juristic being expressly created for the purpose of litigating rights arising out of its own contracts.

The act creates the State Highway Department, consisting of a State Highway Commission and a state highway superintendent. The Commission is to be composed of five commissioners appointed from five highway districts in the state. [Sec. 3025.]

The use of the term "department" in the act is in a sense misleading. For the Highway Commission is some-

thing more than a part of a mere department of the state. It is a juristic entity, as the following provisions indicate:

> "The commission shall have the power to sue in the name of 'the State Highway Commission of Wyoming,' and may be sued by such name in any court upon any contract executed by it." [Sec. 3025.]

> "The attorney general shall prosecute and defend all actions and appear in all proceedings in any federal department in which the commission *shall be a party* or be interested." [Sec. 3025.]

> "The commission shall have an official seal, bearing its name, and under such seal may certify its records, which, so certified, shall be received in the courts as *prima facie* evidence of the original document." [Sec. 3025.]

The possession of a seal, apart from the seal of the state, the right to sue and be sued in its own name, and to appear as a party to a proceeding, import a separation from the state, and a corporate dignity and responsibility.

The Commission has the power to contract for the construction of highways *"any part of the cost of which is paid from the state highway fund."* [Sec. 3027.] Under this section authority is given to let contracts for county highways, providing any portion of the same is paid from the state highway fund, thus placing upon the Commission the duty of performing a county function as distinguished from a strictly state work.

The Commission shall have the authority to acquire rights-of-way for state highways "by purchase or gift," and if such necessary rights-of-way cannot be so acquired, the Commission shall have the authority to acquire the same by condemnation proceedings "in the same manner as is provided by law for the condemnation of rights-of-

way for railroad purposes." The manner of condemning rights-of-way by railroads is prescribed by chapter 314, section 3897, of the Wyoming Compiled Statutes, 1920. Section 4893 of the Wyoming Compiled Statutes, 1920, existing at the time of and since the enactment of the act of 1919 creating The State Highway Commission, provides that "The state, the counties, and each municipal corporation shall have power to purchase or acquire by condemnation any real estate, including streets, alleys or public highways, * * * which power of condemnation shall be exercised in the manner prescribed by law for the condemnation of real estate by railroad corporations." It is significant that the state, having provided for the exercise of eminent domain by itself in a particular manner, should thus expressly grant to the Commission the power to exercise this right in the manner the same is exercised by "the state, the counties, and each municipal corporation."

The Commission shall have power to enter into agreements with counties for co-operative work upon county roads, but such work shall not be commenced until the county has entered into an agreement with the Commission to pay not less than half the total cost of such work to the state. [Sec. 3030.]

Co-operative agreements with the United States under the so-called Federal Aid Act shall be made with the Secretary of Agriculture only by the Commission, *"but may be for the construction or improvement of either a state highway or a county road* * * *. If the highway to be so improved or constructed under such co-operative agreement is not a state highway, the state's share of the cost of such work shall be divided between the state and

the county upon such basis as the Commission shall determine." [Sec. 3031.]

For the use of this Commission a special fund is provided, known as "the state highway fund." The custody of this fund is in the state treasurer, but it is to be kept separate from other funds in his possession. No warrant shall be drawn upon such fund except on voucher approved by the state highway superintendent, an appointee of the State Highway Commission. [Sec. 3034.] This fund is made up of money collected from taxes, money appropriated by the Legislature, money received from state highway bonds, money received from the counties under co-operative agreements made with the Commission, money received from donations accepted by the Commission on behalf of the state, and money received from any other source designated by law for that purpose. [Sec. 3034.]

The balance remaining in the state highway fund at the close of any annual or biennial shall not revert to the general fund of the state, but shall remain in the state highway fund and be subject to subsequent expenditures.

This fund, we believe, has all the characteristics of a special endowment; it is derived from many sources; it is not mingled with other moneys; it is subject only to disposal upon the order of the state highway superintendent, an appointee of the Commission.

It was contended in the Circuit Court of Appeals that the Commission thus created is a *quasi* corporate body, and as such is endowed with citizenship within the meaning of *section 24 of the Judicial Code,* and in support of this contention the following authorities were cited: *Lincoln County v. Luning,* 133 U. S. 529; *Madden v. Lan-*

caster County, 65 Fed. 191; *Butterfield v. State Industrial Accident Commission*, 223 Pac. 941; *Bromwell Co. v. State Board of Charities and Corrections*, 279 Fed. 440; *Hancock v. Louisville & N. R. Co.*, 145 U. S. 409; 43 *Corpus Juris*, 73, and numerous other authorities.

If not a *quasi* corporate body, it was pointed out that the Commission is a collective body of individuals forming a juristic entity, specially empowered by statute to sue and be sued in its own name, and as such entity has a citizenship, within the purview of *section 24 of the Judicial Code*, dependent on the citizenship of its members; citing on this point the case of *Thomas v. Trustees of Ohio State University*, 195 U. S. 207.

The opinion of the Circuit Court of Appeals [Tr. 131] ignores the point that the Commission is a *quasi* corporate body, and bases the citizenship of the Commission upon the rule of *Thomas v. Board of Trustees* [*supra*].

ARGUMENT.

1. There Is No Special Ground in This Case Upon Which the Court Should Exercise Its Jurisdiction to Issue Its Writ of Certiorari.

When analyzed and properly understood, this case has about it nothing that is unique, novel or of any general public interest. It is a suit against The State Highway Commission of Wyoming, a body which, by the act creating it, may sue and be sued by that name. Jurisdiction of the court depends upon diversity of citizenship. To uphold or overthrow this jurisdiction it is necessary merely to determine whether the Commission is what the act says it is, a body that may be sued in its own name,

or is not a body and may not be sued in its own name, but is, in fact, the state itself, having no individuality of a juristic nature which this court will recognize as constituting citizenship.

It should be expressly noted that the suit is not a suit against state property, thus requiring the state to be brought in as a necessary party. It is a suit to recover a judgment against the Commission, which the statute expressly states may be recovered. The suit is not one to recover a judgment which will be binding on state property or on state funds. There is nothing about the prayer for relief nor the allegations of the complaint which shows any intention or right on the part of the plaintiff to collect its judgment out of property of the state. The Circuit Court of Appeals, indeed, has expressly said, although we think in error, that the Commission has no property out of which the judgment can be collected; and, while the question as to the collection of the judgment is not now involved, as we believe, it is admitted that no judgment secured against the Commission can be collected unless the Commission has property in its own name, or the state hereafter supplies a fund to the Commission for the payment of judgments against it, or has already, through appropriate legislation, dedicated to the Commission a fund out of which judgments against it may be paid.

Thus considered, the question becomes merely one of necessary parties before the court. Are we correct in bringing the Commission before the court and asking for a judgment against it, or must we bring the suit against the state itself by its own name, and (since the state is not a citizen) in its own courts?

We do not believe that the question thus presented will warrant the exercise of jurisdiction to issue the writ of certiorari "which should be exercised sparingly and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decisions."

Hamilton Shoe Co. v. Wolf Bros., 240 U. S. 251;
Forsyth v. Hammond, 166 U. S. 506.

2. Cases in Respect to the Application of the Eleventh Amendment to the Constitution of the United States Do Not Apply to the Question of Citizenship Here Involved.

Many cases are cited under division 1 of petitioner's brief in which it has been held that the state is a party within the meaning of the Eleventh Amendment. While all of these cases can, we think, be distinguished upon another ground, it is sufficient to point out that in the present instance we are not considering the principle underlying the application of the Eleventh Amendment. The statute of Wyoming creating the Commission expressly provides that the Commission may sue and be sued in its own name. Insofar as the state has any interest in this controversy, it has, by such provision, expressly waived its immunity from suit. It is not denied that a waiver of this immunity from suit avoids any objection to the jurisdiction made under the Eleventh Amendment. [See Opinion of District Court, Tr. at p. 103, at p. 110.]

The question as to whether the state is a party where the immunity of the Eleventh Amendment is claimed, is very different from the question as to whether or not the state is a party where the question is one of citizen-

ship under the requirement of *section 24 of the Judicial Code.*

The Eleventh Amendment was enacted in response to the public clamor over the decision of the Supreme Court in *Chisholm v. Georgia,* 2 Dill. 419 (*Hans v. Louisiana,* 134 U. S. 1 at 10-17). The amendment has, therefore, been given a broad and liberal construction with the view of protecting the state's immunity, and restricting the jurisdiction of the Federal Court. But *section 24, subdivision 1, of the Judicial Code,* providing for jurisdiction through diversity of citizenship, has been given a broad and liberal construction with the view of upholding the court's jurisdiction.

The rule with respect to the application of the Eleventh Amendment has been thus expressed:

> "To secure the manifest purposes of the constitutional exemption guaranteed by the 11th Amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit it must be held to cover, not only suits brought against a state by name, but those also against its officers, agents and representatives, where the state, though not named as such, is nevertheless the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates."
>
> *Regan v. Farmers Loan & Trust Company,* 154 U. S. 362.

But it is a general rule, where diversity of citizenship is claimed, that the matter is governed by the citizenship of the parties to the record. The mere fact that a party appears in a representative capacity, or that he has no

independent interest in the controversy, does not preclude the assertion of his citizenship as a ground of jurisdiction.

> "We have repeatedly held that representatives may stand upon their own citizenship in the Federal Court, irrespective of the persons whom they represent—such as executors, administrators, guardians, trustees, receivers, etc."
>
> *Mexican Central R. Co. v. Eckman,* 187 U. S. 429.

The personal interest of the party to the record in the effect of the suit is usually regarded of no importance, provided merely that the law gives him the right to sue or be sued in his representative capacity. Thus an executor or administrator has no title to the real property under his control, but such property passes directly to the heir. And yet, neither the fact that an executor or administrator was appointed in the state of which the opposite party is a citizen, nor the fact that the beneficiary whom the executor represents may be a citizen of the same state as that wherein the opposing party is domiciled, affects the question of diversity of citizenship. The domicile of the executor governs his citizenship irrespective of the domicile of the interested parties.

Childress v. Emory, 8 Wheat. 642, 669;
Rice v. Houston, 13 Wall. 66;
Blake v. McKim, 103 U. S. 336;
Dodge v. Perkins, Fed. Case No. 3954;
Hartman v. Fishbeck, 18 Fed. 291;
Wilson v. Hastings Lumber Co., 103 Fed. 801;
McDuffie v. Montgomery, 128 Fed. 105.

A receiver is a mere officer of the court and has no title to the property of the corporation over which he is appointed, and no interest therein except to administer upon the same, yet it is the citizenship of the receiver, and not the citzenship of the corporation which governs.

Smith v. Rackliffe, 87 Fed. 964;
Coal & Iron Ry. Co. v. Reherd, 204 Fed. 859;
Brisenden v. Chamberlain, 53 Fed. 307.

Although the guardian of a minor has no title to the property in his custody (*Lamar v. Micou,* 112 U. S. 452), yet where the guardian by state law may sue in his own name, it is his citizenship, and not the citizenship of the ward, which governs where federal jurisdiction is invoked solely on the ground of diversity of citizenship.

Mexican Central R. Co. v. Eckman, 187 U. S. 429.

The cases cited on page 30 of petitioner's brief are all cases in which the question involved was the immunity furnished by the Eleventh Amendment. For the reasons stated, the rule laid down in them is not the rule which must govern here.

But, assuming that the rule under which the state must be decided to be or not to be a party to this litigation is the same in cases involving the Eleventh Amendment and cases involving merely diverse citizenship, still the authorities cited under subdivision 1 of petitioner's brief are inapplicable for the following reason: That all of such cases are cases in which the action was brought either directly against property of the state, or the necessary result of the action would be to alienate the state from its property without its consent; or else, as in the

case of *Hagood v. Southern,* 117 U. S. 52, the object of the suit was to seek the performance of a state contract by compelling state officers to perform an obligation belonging to the state in its political capacity.

The case of *Smith v. Reeves,* 178 U. S. 436, much relied on in the brief of Petitioner and cited in the dissenting opinion of Judge Scott in the instant case, is an instance of an action brought against a state officer for the purpose of securing the possession of state property. The action was brought against Reeves as state treasurer to compel him to pay out state money, and obviously, as said by the court, "Such a judgment would have the same effect as if it were rendered directly against the state for the amount specified in the complaint."

Murray v. Wilson Distilling Company, 213 U. S. 151, is a case of the same pattern as the *Reeves case,* cited above. The suit was to compel payment to the plaintiff of money which the court held was the property of the state. The effect of the judgment in such a case would be to deprive the state of its property and compel the state to specifically perform its contract. The principle in the *Reeves case* and the *Wilson Distilling Co. case* is but an application of the rule that where the right to property is involved the owner of the property must be made a party to the action. But, as noted, there is in the present case no suit to recover state property, and no prayer for a judgment which, by its terms, will require the turning of state property into the hands of the Utah Construction Company.

3. It Is No Objection to the Present Suit That It Is Brought Against a State Agency.

It is argued that The State Highway Commission is a mere agent of the state of Wyoming, and since a judgment cannot be rendered against an agent, individually, on a contract which he has entered into in the performance of his principal's business, no judgment can be rendered against the Commission arising out of a contract entered into by it in the interest of the state. But this is but a confusion of legal principles. It is true that a mere agent entering into a contract for his principal will not be personally bound. But there is a difference between a mere agent and a juristic entity constituting an agency for the performance of a certain governmental and administrative function, with the right to sue and be sued in its own name.

Thus, a county is a mere agency or arm of the state government; it is "nothing more than certain portions of territory into which the state is divided for the more convenient exercise of the power of government." (*Maryland v. Baltimore etc. R. Co.*, 3 How. 534, 549.) "Such corporations are the mere creatures of the legislative will * * *. They are but subdivisions of the state, deriving even their existence from the Legislature. Their officers are nothing more than local agents of the state." (*Board of Commissioners of Laramie Co. v. Board of Commissioners of Albany County*, 92 U. S. 307.)

Yet a county has a citizenship and a separate individuality, and, when authorized by statute, may sue and be sued, and in such suit is not to be regarded as the state even when the Eleventh Amendment is invoked.

Lincoln Co. v. Luning, 133 U. S. 529;
Chicot Co. v. Sherwood, 148 U. S. 529.

"Suppose," says the brief of petitioner, "that instead of designating the State Highway Commission to enter into contracts for the construction of state highways, the Legislature had seen fit to designate an individual, as, for instance, the Secretary of State, to exercise the powers conferred by the State Highway Act upon the State Highway Commission. According to the opinion of the Court of Appeals, an action would lie against the Secretary of State on such contract, and yet, according to the same opinion, he would not be personally liable thereon." This argument overlooks the difference between a state officer acting for the state and a juristic entity created by the state for the purpose of expressly performing, in its own name, a certain state and county function. A suit against the State Highway Commission in its own name is expressly authorized by the statute. Insofar as the litigation itself is concerned, the state has divorced itself from the right to mingle in the litigation or to assert any interest which it may have in the same by virtue of the fact that a judgment is sought against its creature. The Commission which it has created has been given "a local habitation and a name"; one of the very objects of its creation is the power to sue in that name and in its own interest. If it were possible for the state by its legislation to so endow the Secretary of State, then he, too, could be sued in his own name, and as a separate juristic person, and the state could not be heard to say that the authority which had been given for such suit was "a mere gesture."

The Circuit Court of Appeals properly held that the individual members of the State Board of Highway Commissioners are not subject to suit in the present ac-

tion. The suit must be brought against them as a board, and not against them as individuals. By a like token, a suit against the Secretary of State based upon an authorized state contract which he had entered into, if brought at all, must be brought against him in his official capacity. But no authority to bring suit against him in any official capacity is given. In his official capacity he is the state itself, not an arm of the state nor an agency of the state, and has no powers delegated to him except it be in the name of the state.

4. Decisions of the Supreme Court of Wyoming Cited Are Not Binding Because They Are on Matters Affecting the Federal Court's Jurisdiction. They Are Not Applicable on Other Grounds.

Under division 3 of petitioner's brief, *Hjorth Royalty Company v. Trustees,* 30 Wyo. 309 (222 Pac. 9), and *Franzen v. Southern Surety,* 35 Wyo. 15 (246 Pac. 30), are cited. The *Hjorth case* is given as authority for the proposition that "a suit against a department of the state government or a board or corporation created by the state for governmental purposes, is a suit against the state." The *Franzen case* is cited as a direct decision by the Supreme Court of Wyoming to the effect that a contract made by the State Highway Commission is a contract by the state of Wyoming, and that such construction is binding on the Federal Court.

Hjorth Royalty Company v. Trustees of University, 30 Wyo. 309, was a decision made specially upon the facts before the court. The facts were that the plaintiff sought to quiet title to certain real property owned by the state itself, and inasmuch as the state had not con-

sented to be sued, such action against its property could not be brought. Here again is but another illustration of the general rule that where the subject of an action is property the owner of the property is an indispensable party to the litigation.

Franzen v. Southern Surety Company does not contain a decision but a mere expression, or dictum, that a contract by the State Highway Commission was a contract of the state of Wyoming. It appears that the State Highway Commission had entered into a certain contract with a contracting firm for the construction of a public highway. The contractors had given a bond in which the Southern Surety Company had bound itself to pay for all material used in connection with said work. Action was commenced by a materialman against the bondsman. In defense of the action it was contended that the bond had been required of the contractors under the provisions of a certain statute of Wyoming, and that insofar as the statute required a bond to insure the payment for materials which did not actually go into the work itself and enhance the value of the property, there had been an unconstitutional invasion of the liberty to contract. But the court held that while the Legislature did not have the power to require a bond of the kind indicated in construction contracts made between private persons, a public body did have the right to require such a bond. In deciding this question the court held that the contract was with a public body because executed by the Commission, one of the departments of the state itself. The question as to whether the Commission, under the statute creating it, was the state itself, in the sense contended for by the petitioner in the instant case,

was not considered by the court and not decided. Nor was such decision necessary to the adjudication of the matter before the court. The statute creating the State Highway Commission was not mentioned or construed. The statement that the Commission was the state itself was obviously used in the broad and general sense in which it can be said that a county, being an arm of the state government, is a part of the state itself. A mere dictum of this sort is not a decision of a state statute which is binding upon the federal courts.

> "If the construction put by the court of a state was not a matter in judgment; if it might have been decided either way without affecting any right brought into question, then, according to the principle of the common law an opinion on such question is not a decision."
>
> *Carroll v. Carroll*, 16 How. at 286, 14 L. Ed. 941.

See, also:

> *Southern Railway Company v. Simpson*, 131 Fed. 705, at 709.

But, if the *Franzen case* and the *Hjorth case* are to be taken as setting forth the rule for which they are cited, still they are not binding upon the Federal Court; for the question as to whether this suit is or is not a suit against the state is a jurisdictional question and on matters involving its jurisdiction this court is not bound by the decisions of the state court.

> *Mechanical Appliance Co. v. Castleman*, 215 U. S. 437;
>
> *Southern Photo Material Co. v. Eastman Kodak Co.*, 224 Fed. 523;
>
> *Thomas v. Trustees of Ohio State University*, 195 U. S. 207.

5. The Amendment to the Act Creating the Commission, Passed by the Wyoming State Legislature in 1927, Did Not Deprive the Federal Court of Jurisdiction.

In the year 1927, after the present suit had been filed and the State Highway Commission had appeared and filed its answer, the Legislature of Wyoming amended section 3025 of the Wyoming Compiled Statutes of 1920 so as to provide that the State Highway Commission might be sued in the Wyoming courts and "in no other jurisdiction, upon any contract executed by it."

Under the authority of *Beers v. Arkansas,* 20 How. 527, it is said in petitioner's brief that this subsequent act of the Legislature deprived the Federal Court of all jurisdiction to proceed in the action.

The position thus taken assumes that the present suit has, in fact, been brought against the state of Wyoming. It is true, as decided in *Beers v. Arkansas,* that even where the state gives consent to be sued, it may limit its consent to a particular tribunal in which the action must be brought.

But if, as we contend, the state of Wyoming has created a Commission with the attributes and elements of citizenship, if it has created a juristic entity of a suable nature, it cannot restrict jurisdiction to its own courts over a body thus created.

Chicot County v. Sherwood, 148 U. S. 529;
Barrow v. Kane, 169 U. S. 517.

In the latter case the court, considering an attempt of a state to confine suits against a suable party to its own courts, says:

"The jurisdiction so conferred upon the national courts cannot be abridged or impaired by any statute of the state. Hyde v. Stone, 20 How. 170-175; Smith v. Ames, 169 U. S. 466. It has therefore been decided that a statute which required all actions against a county to be brought in the county court, does not prevent the Circuit Court of the United States from taking jurisdiction of such an action, Chief Justice Chase saying that 'no statute of limitation of suability can defeat a jurisdiction given by the Constitution.' "

6. The Contract Which Forms the Basis of the Action Is Not, by Its Terms, a Contract Between the State of Wyoming and the Utah Construction Company, But Is a Contract of the State Highway Commission of Wyoming. The Question, Moreover, as to the Construction of This Contract Is a Question of No Public Importance and Dependent Upon the Peculiar Facts of the Transaction.

It is true that the testimonium clause of the written contract between the parties recites that the instrument is executed by the state of Wyoming acting through its State Highway Commission.

But the contract is to be construed with reference to its own provisions, and to the construction thereafter placed upon it by the contracting parties.

The act creating the Commission provides for the making of these contracts by the Commission. Aside from the formal contract, which was merely the expression of the parties as to the agreement theretofore entered into, the contract includes the proposal of the Utah Construction Company to do the work. This proposal is made

to The State Highway Commission of Wyoming [Tr. 66]. The contract itself is the acceptance of this proposal. The decision of the Circuit Court of Appeals points out various internal evidences in the instrument indicating that it was the intention of the parties that the contract should be between the Commission and the Utah Construction Company. Most persuasive of these internal evidences is the definition of the contract itself found in the specifications which are incorporated into the formal contract as a part thereof: "6—Contract. The agreement between the contractor and The State Highway Commission covering the work to be performed, and including the plans and specifications." [Tr. 15.] After the making of the formal contract the parties entered into a supplemental contract in which it is recited that the original contract had been entered into "between The State Highway Commission of Wyoming and the Utah Construction Company."

The opinion of the Circuit Court of Appeals is obviously correct in holding that the contract, viewed from its four corners, was the agreement between the contractor and the Commission.

The question as to who were the parties contracting is, moreover, one dependent upon the peculiar facts of the present transaction. It has no public importance. Its decision invokes no new or novel principle. It clearly cannot form the foundation for the exercise of this court's jurisdiction as prayed for in the present proceeding.

7. The Fact That the Commission Has No Property Out of Which a Judgment Against It May Be Paid, Is of No Importance in the Decision of the Jurisdictional Question Here Involved.

The Utah Construction Company is claiming the right in this action to secure a judgment against the State Highway Commission. Whether the Commission has or has not property out of which this judgment may be paid should not, in just reason, deprive us of our right to secure the judgment. It does not affect the jurisdictional question involved except only insofar as it may be taken as an aid to the construction of the statute sought to be placed upon it by petitioner to the effect that no suit against the Commission is permitted.

The District Court of Idaho, per Judge Dietrich, speaking on the right to sue the regents of the University of Idaho, uses the following language applicable to this phase of the question:

> "The objection is urged that, if a judgment is rendered against the defendant, it follows that the court may direct the seizure and sale of its property —that is, of the university—in order to satisfy the judgment, and that no such result could have been contemplated by the Legislature. The objection goes, not to the power of the Legislature to subject the defendant to the jurisdiction of the courts, but, in the absence of an express provision to that effect, the consideration is supposed to militate against the reasonableness of the view that the power of the defendant to be sued is implied. It is not at this time necessary to decide in what manner a judgment could or should be enforced against the defendant, or whether the court could or would, for the purpose of executing its judgment, cause the property of the defendant to be seized and sold."
>
> *Phoenix Lumber Co. v. Regents of University of Idaho*, 197 Fed. 425 at 428-29.

The matter of collecting a judgment in a suit against a state agency was also considered, in a measure, in the case of *Ward v. Board of Regents,* 138 Fed. 372, in which the Circuit Court of Appeals of the Eighth Circuit, speaking through Judge Amidon, considering a similar argument as now urged, says:

> "And in case no funds exist for the purpose, it will be presumed that the Legislature will discharge its duty by providing a fund to meet any liability of the board which is thus judicially established."

The point was also considered by the Supreme Court of the United States in *Hopkins v. Clemson State Agricultural College,* 221 U. S. at 648, where the court says:

> "Besides, we have no right to proceed on the theory that if, at the time of the litigation, plaintiff establishes his right to damages, the judgment would not be paid. These suggestions, though made in pleas to the jurisdiction, afford no reason why the college should be granted immunity from suit."

Respectfully submitted,

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